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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-312

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner

VS.

DAVID WARE, et al.,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the First Appellate District

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeal (App. A of The Petition) is reported at 24 Cal. App. 3d 35, 100 Cal. Rptr. 791 (1972). The Supreme Court of the State of California denied Merrill Lynch's Petition for a Hearing without comment on May 10, 1972.

JURISDICTION

No basis exists for invoking the jurisdiction of this Court. The reference in the Petition to 28 U.S.C. § 1257(3) is unsupported. The decision of the state court:

1. Did not involve a federal question;

2. Is not final either under California law or the guidelines established by this Court.

This lawsuit was filed in the state court and concerns nothing more than the application of California restraint of trade law to a profit sharing plan of a corporation doing significant business in California. A compendium of similar cases all decided under state law may be found in 18 A.L.R. 3d 1246 (1968), and 81 A.L.R. 2d 1066 (1962).

QUESTIONS PRESENTED

1. Does the application of California restraint of trade law invalidating a forfeiture provision in a profit sharing plan of a national corporation as applied only to the citizens of that state constitute an impermissible burden on interstate commerce

(a) where the profit sharing plan itself was drafted pursuant to the laws of a sister state;

(b) has nothing whatsoever to do with the type of business in which the employer is engaged; and

(c) where the plan itself provides that it is to be construed according to state law?

2. Does state law evincing strong public policy, whereby a lawsuit for wages may be maintained notwithstanding the existence of a private arbitration agreement, involve a substantial federal question when the Petitioner itself invoked the application of the state arbitration processes?

STATUTES INVOLVED

California Business and Professions Code

§16600. *Invalidity of Contracts.* Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.

California Labor Code

§229. *Actions to enforce payment of wages; effect of arbitration agreements.* Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. . . .

STATEMENT

This litigation was commenced by a former employee of Petitioner on behalf of himself and all other residents of the State of California who were formerly employed in California by Merrill Lynch and who, by reason of pursuing lawful competitive employment,

were denied distribution of their earned profit sharing credits by reason of Article 11.1 of the Plan.[1]

The complaint challenged the forfeiture provision under California unfair competition law, California Business and Professions Code §16600, 1 R. 1-6, 44, charging, in essence, breach of the employment contract and illegality of Article 11.1.

Thereafter, Merrill Lynch filed its answer pursuant to California law, denying the allegations of the complaint, but admitting that it pursued a uniform policy of forfeiture in California as alleged by respondent, 1 R. 51-61.

Merrill Lynch did not seek removal of the action to federal court. 28 U.S.C. 1445, et seq.

Petitioner, in the same action, then filed a petition to compel arbitration and to stay all proceedings pursuant to California's comprehensive arbitration legislation. Code of Civil Procedure §1280-1294.2, et seq., 1 R. 132-138, 149-153.

Petitioner did not assert the applicability of the Federal Arbitration Act, 9 U.S.C. 1, et seq., or of federal arbitration law. 1 R. 75-80, 132-138.

The trial court, by minute order, denied arbitration based solely upon ruling California case law and the

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[1] ARTICLE 11. *Forfeiture of Benefits.*

11.1 A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960.

state statute interpreted therein. 1 R. 194. A timely appeal was taken by Merrill Lynch and the decision of the trial court was affirmed (Appendix A of the Petition), again on the basis of California law.

It is noteworthy that Petitioner accepted the application of California law in the case of *Frame v. Merrill Lynch*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971) which preceded the instant action on appeal and wherein Article 11.1 of the Plan was declared illegal and void under California law.

Merrill Lynch did not petition for rehearing of the *Frame* decision before the California Court of Appeal, nor did it request a hearing before the California Supreme Court or this Court.

The *Ware* case has been remanded to the trial court for a hearing on the merits. (Appendix A of the Petition, pp. 11-12.)

ARGUMENT

The decision herein does not involve a substantial federal question or, for that matter, a federal question at all. Petitioner strains the limits of legal advocacy by asserting that somehow a wage dispute involving a profit sharing plan comes within the congressional legislation embodied in the Securities Exchange Act of 1934. The fact that Petitioner happens to be involved in the securities business is peripheral to the manner in which it compensates its employees.

To carry Petitioner's argument to its logical conclusion would mean that any time an employee has a

wage dispute with his employer and that employer's business happens to involve the sale of securities or any transaction in interstate commerce, federal courts and, perforce, federal law would be called into play. This Court is simply not a referee of every backyard or neighborhood dispute.

By way of example, workmen's compensation and disability laws differ from state to state regardless of the interstate aspects of the employer's business, yet, this variance has not been viewed as an impermissible burden on interstate commerce.

In point of fact, the profit sharing plan, by its own terms, was drafted under New York law and seeks to employ the laws of that state, 1 R. 47, as to all questions of construction and interpretation.

Petitioner's position, simply stated, is that a compensation plan drafted pursuant to the laws of one state which happens to be favorable should be forced upon the residents of all other states, notwithstanding what the laws of the state of residency and employment provide.

I

THE STATE COURT DECISION DOES NOT INVOLVE A FEDERAL QUESTION

1. The Decision Below does not Involve the Application of State or Federal Antitrust Laws.

It is essential to a review of a state court decision by this Court that an important federal issue be tendered to the state court and, further, that such a

question be, in fact, decided. *Cardinale v. La.*, 394 U.S. 437 (1969). Neither requirement has been met in this case.

This controversy pivots around the interpretation and application of California Business and Professions Code §16600 which (contrary to Petitioner's characterization as an antitrust law) is a legislative adoption of common law principles of restraint of trade. Moreover, California antitrust laws are solely embodied in the Cartwright Act, Business and Professions Code §16700-16758, titled "Combinations in Restraint of Trade." It is §16722 of the Cartwright Act which Petitioner apparently confuses with §16600. That section (16722) provides that "Any contract or agreement in violation of this chapter is absolutely void and is not enforceable at law or in equity."

The complaint does not allege the existence of a monopoly, conspiracy or combination aimed at destroying competition, or any concert of action, whatsoever. These are the ingredients of a claim under either state or federal antitrust laws. *Chas. A. Ramsay & Co. v. Assoc. Billposters*, 260 U.S. 501 (1922); *People v. Santa Clara Valley Bowling Proprietors Assn.*, 238 Cal. App. 2d 225, 47 Cal. Rptr. 570 (1965).

Nor is there a prayer for treble damages.

Agreements involving alleged restraint of trade between an employer and its employee are not circumscribed by antitrust legislation. *Light Corrugated Box Corp. v. Southern Kraft Corp.*, 20 N.Y.S. 2d 66 (1940); *Bondi v. Jewels by Edwar, Ltd.*, 267 Cal.

App. 2d 672, 73 Cal. Rptr. 494 (1968); *Austin v. House of Vision*, 404 F. 2d 401 (7th Cir. 1969).

It is anomalous to suggest that in a situation where every member of the class has secured competitive employment in an open market, antitrust laws apply. *Triton Ins. Underwriters, Inc. v. National Chiropractic Ins. Co.*, 232 Cal. App. 2d 829, 833, 43 Cal. Rptr. 504 (1968).

If the complaint had alleged violations of the antitrust laws, it would, by that fact alone, be exempted from private arbitration agreements. *Assoc. Milk Dealers v. Milk Drivers*, 422 F. 2d 546, 562 (7th Cir. 1970). Matters of public policy are best resolved by judges, not arbiters.

The application of state law in a securities business context was confirmed in *Gitelson v. duPont*, 268 N. Y. Supp. 2d 11, 215 N.E. 2d 366 (1966), where a former employee sued a member of the New York Stock Exchange to recover pension benefits forfeited and by every state and federal court that has considered the question. See Annot. 18 A.L.R. 3d 1246 (1968) and 81 A.L.R. 2d 1066 (1962).

Likewise, the appellate court in the *Ware* case based its decision solely on California state law without reference whatsoever to federal law, following an unbroken line of cases which have uniformly held such forfeitures invalid in California.

The issue, simply, is one of comity.

> "Comity between states does not require a law of one state to be executed in another when it would be against the public policy of the latter state. . .

"The rule of the cases cited is approved by the Supreme Court and other federal courts . . . when the policy of a state by a special law has been made manifest, the courts of the United States will be bound to notice the statute of policy as a part of its code of laws, and to declare all contracts in the state repugnant to it to be illegal and void . . ."

Davis v. Jointless Fire Brick Co., 300 F. 1 (9th Cir. 1924) at pp. 3 and 4.

Comity between the states is a question within the exclusive jurisdiction of the state courts. *Allen v. Alleghany Co.*, 196 U.S. 458 (1905).

The decision by any analysis rests squarely upon an independent and adequate state ground.

2. The Decision Below does not Involve the Application of Federal Securities Law.

As Petitioner recognizes, the intent behind the Securities Exchange Act of 1934 is ". . . to insure fair dealing and to protect investors . . ." 15 U.S.C. 78f(d).

The Act does not apply to situations involving employer-employee relations within the securities industry, *Gitelson v. duPont*, supra, despite the existence of a private arbitration agreement.

No provision of the Securities Exchange Act commands arbitration. 2 R. Exh. G, p. 11. On the contrary, three sections of the Act of 1934 expressly preserve the right of an individual to a judicial forum: 15 U.S.C. 78i(e), 15 U.S.C. 78p(b), and 15 U.S.C. 78r(a).

The Supreme Court, as well as other federal courts, has long recognized that civil litigation is fully compatible with the policies reflected in the federal securities legislation. *Wilko v. Swan*, 346 U.S. 427 (1953); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Maheu, et al. v. Reynolds & Co.*, 282 F. Supp. 423 (S.D.N.Y. 1967); *Reader v. Hirsch & Co.*, 197 F. Supp. 111 (S.D.N.Y. 1961).

Further, the Act states that no rule or agreement of any exchange shall be construed as a waiver of any constitutional right, such as the right to a court or jury trial. 15 U.S.C. 78f(a)(1).

By necessity, the New York Stock Exchange Constitution, Article VIII, preserves the right of nonmember employees to have disputes settled in a courtroom except where the nonmembers, themselves, elect to use arbitration. 2 CCH N.Y. Stock Exchange Guide, Para. 1351 (Appendix A). *Axelrod & Co. v. Kordich, Victor & Neufeld*, 320 F. Supp. 193 (S.D. N.Y. 1970), Affirmed 451 F. 2d 838 (2nd Cir. 1971). Each member of the class in this case is a nonmember of the New York Stock Exchange.

The profit sharing plan, itself, does not refer to the Security Act or federal law.

The right of an individual to all lawfully accrued wages is a matter of significant local interest, and California Labor Code §229 typifies this strong public policy and concern of the State for its citizens. *City of Ukiah v. Fones*, 64 Cal.2d 104, 410 Pac.2d 369 (1966).

In fact, the exceptions carved from the arbitration process by §229 are not unique. The equivalent may be found in federal arbitration law which excludes from its machinery employment contracts of seamen, railroad employees and "any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1.

Stockbrokers, as a class, perform work which involves interstate commerce. (Petition, p. 12.) Accordingly, had the petition to arbitrate been tendered under federal law, it would have likewise been denied.

Contrary to the Petitioner's sweeping statements that the California court's decision emasculates the New York Stock Exchange arbitration process, the decision has limited its area of effectiveness to wage disputes. Any other controversy is still subject to arbitration.

II

THE DECISION BELOW IS NOT FINAL

The decision of the California Court of Appeal affirming the trial court's minute order, 1 R. 194, denying the petition for arbitration under state law is not final, either under California law, or the rules fashioned by this Court. "Every direction of a court or judge in a civil action, made or entered in writing, and not included in a judgment, is denominated an order." California Code of Civil Procedure §1003.

Although such an order denying arbitration is specifically made appealable per California Code of

Civil Procedure §1294, nevertheless, it is interlocutory in nature. *Berman v. Renart Sportswear Corp.*, 222 Cal. App. 2d 385, 388, 35 Cal. Rptr. 218 (1963). Interlocutory means, in essence, that something further is left to be determined before a final judgment is entered. *Reed v. Reed*, 9 Cal. App. 748, 752, 100 Pac. 897 (1909).

In point of fact, no judgment has been entered on the pleadings in this case. The dispute has been remanded to the trial court for further proceedings with the following direction:

> "Any other issues under the pleadings may, of course, be considered by the trial court." Opinion of the Court, 2 R. Ex. J. p. 14.

According to the criteria established by this Court,

> "It (state court decision) must be subject to no further review or correction in any state tribunal; it must, also, be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein."
>
> *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945).

This same test for determining whether the judgment is final has been adopted by the California Supreme Court. *People v. Succop*, 65 Cal. 2d 483, 486; 421 Pac.2d 405 (1966).

As such, the order denying arbitration has not been stamped with the imprimatur of finality as required by this Court for review. *Baltimore Contractors v. Bodinger*, 348 U.S. 176 (1954).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents.

FEENEY AND SPARKS,

Of Counsel.

October 2, 1972

(Appendix A Follows)

Appendix A

CONSTITUTION OF THE NEW YORK STOCK EXCHANGE, INC.

Article I

Title—Objects—Definitions

¶ 1001—Title

SEC. 1. The title of this Corporation shall be the "NEW YORK STOCK EXCHANGE, INC."

¶ 1002—Objects

SEC. 2. Its objects and purposes shall be:

(a) to furnish exchange rooms for the convenient transaction of their business by its members; to furnish other facilities for its members, allied members, member firms and member corporations; to maintain high standards of commercial honor and integrity among its members, allied members, member firms and member corporations; and to promote and inculcate just and equitable principles of trade and business;

(b) to conduct and carry on the functions of a "board of trade" within the meaning of that term in the New York Not-for-Profit Corporation Law;

(c) to conduct and carry on the functions of an "exchange" within the meaning of that term in the Securities Exchange Act of 1934; and

(d) to conduct and carry on any and all activities incidental to the foregoing which may lawfully be conducted and carried on by a corporation of its type formed under the New York Not-for-Profit Corporation Law.

¶ 1003—Definitions

Sec. 3. Unless the context requires otherwise, the terms defined in this Section shall, for all purposes of the Constitution, have the meanings herein specified:

Member

(a) The term "member" means a member of the Exchange, and does not include within its meaning an allied member of the Exchange.

Membership

(b) The term "membership" refers to the members of the Exchange, and does not refer to the allied members.

Member firm

(c) The term "member firm" means a firm, transacting business as a broker or a dealer in securities, at least one of whose general partners is a member of the Exchange or which has the status of a member firm by virtue of permission given to it by the Board of Governors pursuant to the provisions of Section 13(a) of Article IX.

Allied member

(d) The term "allied member" means:

(i) a general partner in a member firm who is not a member of the Exchange and who has become an allied member as provided in Article IX, or

(*ii*) an employee of a member corporation who is actively engaged in its business and devotes the major portion of his time thereto, who is not a member of the Exchange, who has become an allied member as provided in Article IX, and who is either:

(*a*) a director and a holder of record and beneficial owner of voting stock of such corporation, or

(*b*) a principal executive officer and a holder of record and beneficial owner of voting stock of such corporation, or

(*c*) a holder of record and beneficial owner of 5% or more of the outstanding voting stock of such corporation.

Non-member

(e) The term "non-member" means a party not a member, allied member, member firm or member corporation.

Member corporation

(f) The term "member corporation" means a corporation, transacting business as a broker or dealer in securities, approved by the Board of Governors as a member corporation, having at least one member of the Exchange who is a director thereof and a holder of voting stock therein. A corporation shall cease to be a member corporation if the approval of the Board of Governors is withdrawn or if it shall cease to transact business as a broker or dealer in securities or to have a member of the Exchange as a director thereof and holder of voting stock therein, unless the

corporation has the status of a member corporation by virtue of permission given to it by the Board of Governors pursuant to the provisions of Section 13 (b) of Article IX.

Approved person

(g) The term "approved person" means a party who is not an employee, a member or an allied member of a member corporation, who has become an approved person as provided in Article IX, and who is a director of a member corporation, or who beneficially owns 5% or more of the outstanding voting stock of a member corporation.

Freely transferable security

(h) The term "freely transferable security" means (*i*) any stock which on its face may be transferred without it being necessary that the Exchange approve the transferee, and (*ii*) any debt instrument which on its face may be transferred without it being necessary that the Exchange approve the transferee and which evidences a liability subordinated to general creditors as approved by the Exchange.

Voting stock

(i) The term "voting stock" means stock in a corporation the holders of which are entitled to vote for the election of the directors of such corporation.

Non-voting stock

(j) The term "non-voting stock" means stock of any class in a corporation other than voting stock.

(k) The term "entire Board" means the total number of Governors which the Exchange would have if there were no vacancies.

When a meeting is adjourned to another time or place, it shall not be necessary to give any notice of the adjourned meeting, if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken, and at the adjourned meeting any business may be transacted that might have been transacted on the original date of the meeting.

¶ 1313—Presiding Officer

SEC. 13. At any meeting of the members of the Exchange, if neither the Chairman of the Board nor the Vice Chairman of the Board nor a member of the Board of Governors authorized to act for the Chairman of the Board under Section 2 of Article V shall be present, the members present, in person and by proxy, shall appoint a presiding officer for the meeting.

Article VIII
Arbitration

¶ 1351—Controversies Arbitrated

SEC. 1. Any controversy between parties who are members, allied members, member firms or member corporations shall, at the instance of any such party, and any controversy between a non-member and a member or allied member or member firm or member corporation arising out of the business of such mem-

ber, allied member, member firm or member corporation, or the dissolution of a member firm or member corporation, shall, at the instance of such non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Governors.